



Office of the Washington State Auditor
Pat McCarthy

Whistleblower Investigation Report

Department of Corrections

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January 28, 2021

Stephen Sinclair, Secretary
Department of Corrections

Report on Whistleblower Investigation

Attached is the official report on Whistleblower Case No. WB 21-003 at the Department of Corrections.

The State Auditor's Office received an assertion of improper governmental activity at the Department. This assertion was submitted to us under the provisions of Chapter 42.40 of the Revised Code of Washington, the Whistleblower Act. We have investigated the assertion independently and objectively through interviews and by reviewing relevant documents. This report contains the results of our investigation.

If you are a member of the media and have questions about this report, please contact Director of Communications Kathleen Cooper at (564) 999-0800. Otherwise, please contact Assistant Director of State Audit Troy Niemeyer at (564) 999-0917.

Sincerely,

Pat McCarthy

State Auditor

Olympia, WA

cc: Governor Jay Inslee

Michele Walker, Audit Director/Ethics Advisor

Kate Reynolds, Executive Director, Executive Ethics Board

Cheri Elliott, Investigator

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WHISTLEBLOWER INVESTIGATION REPORT

Assertion and Results

Our Office received a complaint asserting two Department of Corrections (Department) employees who are married to each other were using Paid Family Medical Leave, a new state program, for their assigned shifts, while working other shifts at an overtime rate.

Our initial inquiry found that one of the employees worked only one overtime shift, so we focused our investigation on the other employee (subject). We found that from March 2020 through July 2020, the subject used state-earned vacation and sick leave as well as Paid Family Medical Leave, in addition to other types of state and federal leave.

We found no reasonable cause to believe an improper governmental action occurred.

Background

In January 2020, the state began administering the Paid Family Medical Leave (PFML) program, funded by employees and employers. Under this program, employees can receive up to 12 weeks of paid leave.

In March 2020, the Families First Coronavirus Response Act (FFCRA) became law, containing two key provisions for employers – the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Both provide paid leave to employees for COVID-19-related reasons, and both expire December 31, 2020.

The EPSLA allows employees 80 hours of sick leave if:

- The employee or someone the employee is caring for is subject to a government quarantine order;
- The employee has been advised by a health care provider to self-quarantine;
- The employee is experiencing COVID-19 symptoms and is seeking medical attention;
- The employee is caring for an individual who is subject to a quarantine; or
- The employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable for COVID-19-related reasons.

The EFMLEA provides up to 10 weeks of paid and two weeks of unpaid medical leave to eligible employees who are caring for their child whose school or place of care is closed or whose child's provider is unavailable due to COVID-19.

In March 2020, Gov. Inslee directed state agencies to arrange for staff who are required to self-quarantine, but are otherwise healthy, to work from home. The Governor's email said that if working from home was not possible, the agencies were to release the employee from work, with

no loss in pay, for no longer than 14 days. The governor said this release from work with pay “would be a very rare outcome and we will explore all options short of this step.”

In response to the Governor’s direction, the Department initiated a 14-day administrative leave plan for staff who had to self-quarantine and could not telework.

About the Investigation

The subject is a correctional sergeant at Washington State Penitentiary, a maximum-, close-, medium-, and minimum-security facility. The facility has 1,200 employees, 700 of whom are custody staff, and currently supervises 2,086 offenders. About 600 custody staff work during a 24-hour period. The subject is scheduled to work from 6:10 AM to 2:10 PM (second shift) Thursday through Monday, with Tuesday and Wednesday off. The complaint stated that the subject was using PFML for his scheduled shift, but worked the third and first shifts back-to-back for overtime. Additionally, the subject worked the second shift on his normal days off, also at the overtime rate.

According to the complaint, the subject was using leave to care for a household member and his spouse was doing the same. The complainant also questioned how the subject could work 16 hours and still provide care.

According to the Department, during this time, on average, the facility was short 70 custodial staff every day.

We reviewed the subject’s leave and attendance.

From January 1, 2020, through March 13, 2020, the subject worked his scheduled shift, not working any of his days off and working only two overtime shifts.

Between March 29 and June 8, the subject used PFML. During this time, he did not work any shifts.

Between June 11 and June 22, he used EPSLA. During this time, he did not work any shifts.

Between June 25 and July 31, the end of our investigative period, the subject used EFMLEA for his regularly scheduled shifts. On five days, he worked two overtime shifts each day, and on five other days, he worked one overtime shift each day. On another day, he worked 9.9 overtime hours, and on a different day, he worked 14.1 overtime hours.

According to their collective bargaining agreement, custody officers can use sick leave for their scheduled shift and still work other shifts on the same day. A union representative explained that the sick leave for the scheduled shift must be prearranged. According to leave documents, the subject was submitting leave two to four weeks in advance.

The U.S. Department of Labor website includes questions and answers regarding the use of EPSLA and EFMLEA. Two questions related to more than one guardian using emergency leave to care for a child. The responses were, in part:

Regarding EFMLEA: “Generally, you do not need to take such leave, if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs.”

Regarding EPSLA: “Under the Department of Labor . . . regulations, an employee does not have a need for EPSLA leave if another suitable individual is available to provide the care the employee’s child needs.”

According to the website, employers are required to document the following information when an employee uses leave for childcare:

- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child.

We reviewed leave and attendance to determine whether both employees were using EPSLA and EFMLEA in accordance with the law. We found the subject’s spouse was also using EPSLA and EFMLEA during the same time as the subject.

Between June 25 and July 31, both used EFMLEA.

The subject and spouse filled out the required form for taking childcare leave under EPSLA and EFMLEA. In June, the subject submitted the form listing three children who needed his care. On the form, he checked the box that stated no other suitable persons were available to care for the children. The previous month his spouse had filled out the form also checking the box that no other suitable persons were available to care for the same children. Both also filled out another version of the form, with all four forms stating that they were caring for the same children and that there was no other suitable person to care for their children. Between June 11 and July 31, the subject and his spouse used EPSLA and EFMLEA to care for the same children.

When we spoke with the subject and his spouse, both said that they were not watching the same children. They said that the subject’s spouse was teaching the two oldest children due to their school closure, and the subject was caring for their infant.

The subject and his spouse said their normal caregiver could not care for the children because he is at high risk for COVID-19. The spouse also said there was an issue with their shifts overlapping.

Although the subject said he and his spouse were caring for different children, neither indicated that on the four forms they filled out and signed. In addition, the subject began using this leave on

June 11, seven days before the end of the school year, which ended June 18. We confirmed with the subject that this was the date he began watching his baby so his spouse could instruct the other children. He continued to remain on this leave at least through the end of our investigative period – July 31, 2020.

An additional factor to consider when determining whether an improper governmental action occurred is that human resources approved the leave for both employees. After approving the leave, human resources staff contacted Department counsel about the situation and were told that they could request a statement from the employees regarding why no other suitable person was available and ask how their situation was changed due to COVID-19. Another option was to make a temporary adjustment to the subject and his spouse's schedules to eliminate the overlap so they could hand off the childcare duties. According to a human resources consultant, they did not act on either of the suggestions because many couples in the Department were doing the same thing.

The human resources manager and consultant said all of these leave programs were new, with everyone learning how to process them. They did not know what questions they could ask or if they could question an employee's use of the leave. As months have passed, the human resources manager and consultant said they better understand how to process the various leave programs.

Because the subject was not aware of the limitations regarding using EMFLEA and EPSLA, and there was no instruction from human resources, we found no reasonable cause to believe an improper governmental action occurred.

Recommendation

Due to the ongoing shortage of correctional staff, we recommend the Department thoroughly vet the use of leave by two members of the same household. The Department should look to the guidance provided by its counsel to help mitigate the absences from its facilities.

State Auditor's Office Concluding Remarks

We thank Department officials and personnel for their assistance and cooperation during the investigation.

WHISTLEBLOWER INVESTIGATION CRITERIA

We came to our determination in this investigation by evaluating the facts against the criteria below:

RCW 50A.15.060 Benefit exclusions and disqualifications—Employee penalties.

*** CHANGE IN 2020 *** (SEE [2614-S.SL](#)) ***

- (1) An employee is not entitled to paid family or medical leave benefits under this title:
 - (a) For any absence occasioned by the willful intention of the employee to bring about injury to or the sickness of the employee or another, or resulting from any injury or sickness sustained in the perpetration by the employee of an illegal act;
 - (b) For any family or medical leave commencing before the employee becomes qualified for benefits under this title;
 - (c) For an employee who is on suspension from his or her employment; or
 - (d) For any period of time during which an employee works for remuneration or profit.